

DEC 1 1923

WM. R. STANSBURY
CLERK

No. [REDACTED] 146

In the
Supreme Court of the United States.
October Term, 1923.

L. B. NORTON, BETTIE, KIZZIE GOUGE, OK-
CHUMPULLA, *ET AL.*, *Appellants,*

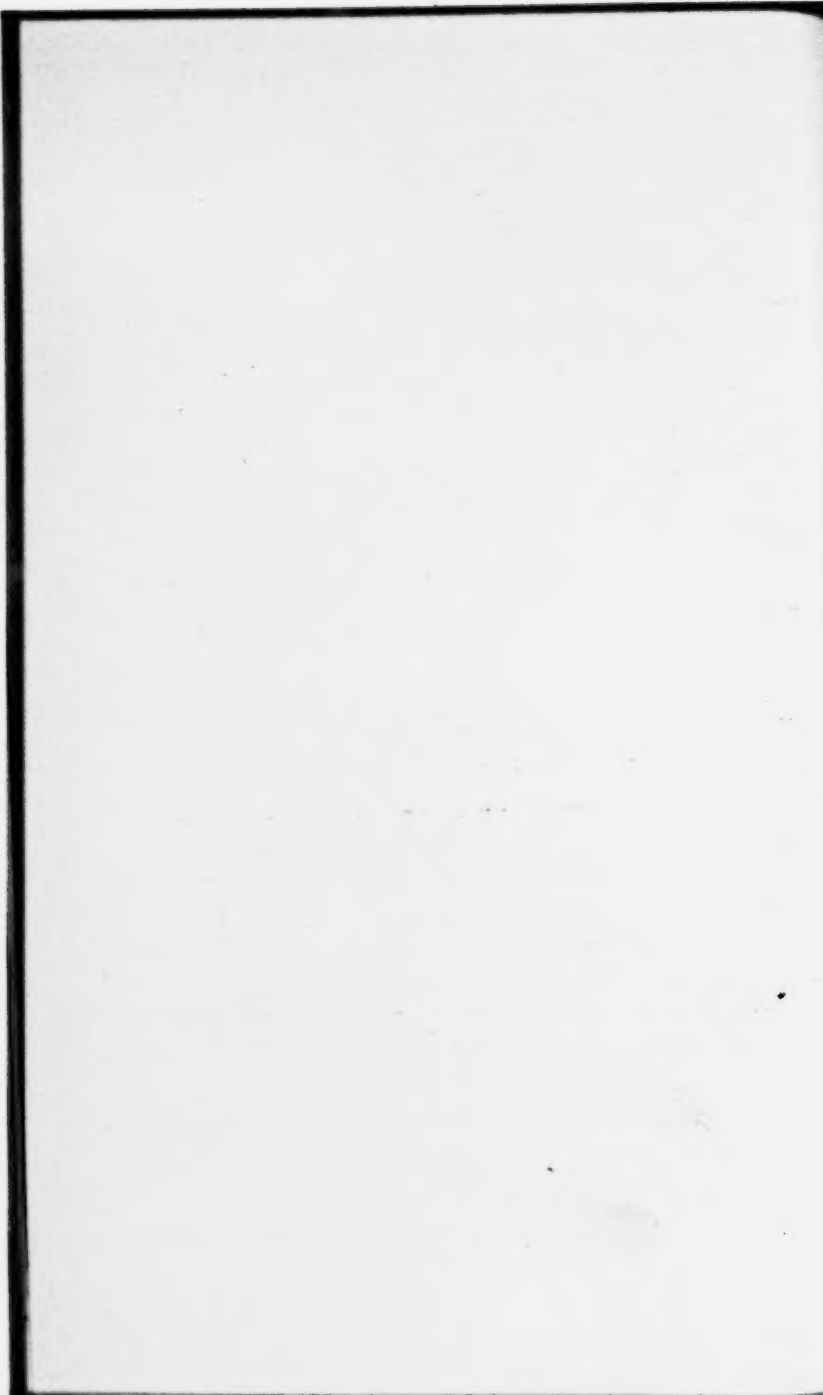
VERSUS

CHEPARNEY LARNEY, A MINOR, AND BENNIE
GREEN, HIS LEGAL GUARDIAN, *Appellees.*

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF ON BEHALF OF APPELLEES.

ELIAS J. VANCOURT,
CLARK NICHOLS,
HORACE D. REUBELT,
Counsel for Appellees.



INDEX.

	PAGE
Statement of the Case.	1
Argument.	3
The decision of the Commissioner to the Five Civilized Tribes in enrolling Cheparney Larney and identifying him as the child of Big Jack and Bettie, enrolled opposite numbers 8291 and 8292, respectively, on the Creek Roll, conclusively identifies the allottee as the child of these persons.	3
Did the trial court have jurisdiction of this cause?	22

CASES CITED.

<i>Doolan v. Carr</i> , 125 U. S. 618, 8 Sup. Ct. 1228, 31 L. ed. 844.	23
<i>Horne v. Hammond Co.</i> , 155 U. S. 393, 15 Sup. Ct. 167, 39 L. ed. 197.	23
<i>Mahoning Valley Railway Co. v. O'Hara</i> , 196 Fed. 945, 116 C. C. A. 495.	23
<i>Porter v. U. S.</i> , (C. C. A.) 260 Fed. 1.	6, 7, 11
<i>Robertson v. Cease</i> , 97 U. S. 646, 24 L. ed. 1057.	23
<i>Sun Printing Ass'n. v. Edwards</i> , 194 U. S. 377, 382, 24 Sup. Ct. 696, 48 L. ed. 1027.	23



IN THE
SUPREME COURT OF THE UNITED STATES.
October Term, 1923.

No. 494.

L. B. NORTON, BETTIE, KIZZIE GOUGE, OK-
CHUMPULLA, *ET AL.*, *Appellants*,

vs.

CHEPARNEY LARNEY, A MINOR, AND BENNIE
GREEN, HIS LEGAL GUARDIAN, *Appellees*.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF *on BEHALF of APPELLEES.*

Statement of the Case.

This case presents for determination a question of the identity of a certain full-blood Creek Indian known as Cheparney Larney, enrolled on the New Born Creek Tribal Roll, No. N. B. C. 1287, under the Act of March the 3rd, 1905, (33 Stat. L. 1060).

Appellants claim that the Indian enrolled as Cheparney Larney and whose name appears on said New Born Creek Rolls, was the deceased child of "Big Jack", enrolled as a full-blood Creek Indian on the Creek Tribal Rolls, opposite Roll No. 8291, and Bettie who is enrolled as a full-blood Creek Indian on the Creek Tribal Rolls, opposite Roll No. 8292.

Appellee claims to be the Indian, Cheparney Larney, enrolled as a New Born Creek opposite Roll No. N. B. C. 1287, that his father was Jacob Larney, also known as Jacob Tiger, enrolled as a full-blood Creek Indian on the Creek Tribal Rolls, opposite Roll No. 7968, and that his mother is Pettie Larney, enrolled as Lucy Green on the Creek Tribal Rolls as a full-blood Creek Indian opposite Roll No. 8631.

ARGUMENT.

Appellants in their brief argue two propositions as follows, to-wit:

1. The decision of the Commissioner to the Five Civilized Tribes in enrolling Cheparney Larney and identifying him as the child of Big Jack and Bettie, enrolled opposite numbers 8291 and 8292, respectively, on the Creek Roll, conclusively identifies the allottee as the child of these persons.

2. Did the trial court have jurisdiction of this cause?

I.

The decision of the Commissioner to the Five Civilized Tribes in enrolling Cheparney Larney and identifying him as the child of Big Jack and Bettie, enrolled opposite numbers 8291 and 8292, respectively, on the Creek Roll, conclusively identifies the allottee as the child of these persons.

The land in question was an allotment pursuant to Act of Congress of March the 3rd, 1905, (31 Stat. 1071); made to a citizen of the Creek Tribe of Indians named in the deeds as Cheparney Larney.

It is the claim of appellants that the person who was enrolled was a son of "Big Jack" one of the original defendants; that the son died about November, 1906, and that appellants succeeded to the rights of said deceased son in the allotted land.

It is the claim of appellee that he is the person who was enrolled as a full-blood Indian on the Creek Tribal Rolls, opposite Roll No. 1287, and that he thereby became entitled to and received as his allotment the land in question. The Act of March the 3rd, 1905, provides:

"That the Commission to the Five Civilized Tribes is authorized for sixty days after the approval of this act to receive and consider applications for enrollments of children born subsequent to May 25, 1901, and prior to March 4, 1905, and living on said latter date, to citizens of the Creek Tribe of Indians whose enrollment has been approved by the Secretary of the Interior prior to the date of the approval of this act; and to enroll and make allotments to such children."

The vital question in this case is therefore one of identity, and it involves said statute under which the Commissioner was acting and the construction of the decision of the Commissioner to the Five Civilized Tribes granting and ordering the enrollment involved. The decision of the Commissioner is as follows:

"Department of the Interior. Commissioner to the Five Civilized Tribes. In the matter of the application for the enrollment of Cheparney Larney as a citizen by blood of the Creek Nation.

"DECISION.

"It appears from the records of this office that on April 24, 1905, testimony was offered

'in the matter of the application for the enrollment of certain new borns, as citizens of the Creek Nation,' which embraced a child of Jacob Larney (or Green) and Bettie Larney (or Green), which is herein considered as an original application for the enrollment of said person as a citizen by blood of the Creek Nation. Further proceedings were had February 16, 1907.

"It appears from the testimony that about July 19, 1905, a Creek field party went to the home of said child for the purpose of obtaining information with reference to the right to enrollment of said child, and that the parents refused to give such information, because of the influence over them of the Snake or disaffected faction of the Creeks; that the clerk in charge is under the impression that said child is a male, but states that he could not learn the name of said child. In view of the fact that the full name of said child could not be ascertained, and that it is believed that said child is a male, reference to said person will hereinafter be made under the name of Cheparney Larney, the Creek word 'Cheparney' signifying 'little boy.'

"The evidence and the records of this office show that said Cheparney Larney is the child of Jacob Larney and Bettie Larney, whose names appear as 'big Jack' and 'Bettie' on a schedule of citizens by blood of the Creek Nation, approved by the Secretary of the Interior March 28, 1902, opposite Nos. 8291 and 8292, respectively. The evidence shows that about July 19, 1905, said Cheparney Larney appeared to be about one year old.

"Although the evidence herein is not as

full and complete as has heretofore been required by this office to establish the right of a person to be enrolled as a citizen of the Creek Nation, in view of the provisions of the Act of Congress approved April 26, 1906 (34 Stat. 137), fixing March 4, 1907, as the date after which the Secretary of the Interior shall have no jurisdiction to approve the enrollment of any person as a citizen of said Nation, it is believed that the evidence herein should be considered sufficient to establish the facts necessary to enrollment.

"It is therefore ordered and adjudged that said Cheparney Larney is entitled to be enrolled as a citizen by blood of the Creek Nation, under the provisions of the Act of Congress approved March 3, 1905 (33 Stat. 1048), and the application for his enrollment as such is accordingly granted.

"Tams Bixby, Commissioner.

"Muskogee, Indian Territory, February 23, 1907."

In determining the identity of the allottee it should be borne in mind that Congress authorized the Dawes Commission to receive and consider applications for enrollments of children born subsequent to May the 25th, 1901, and prior to March 4, 1905, and living on said latter date, etc.

Our position is that the application for enrollment received and considered by the Dawes Commission is jurisdictional and determines the identity of the person enrolled. This principle was settled in the case of *Porter v. U. S.*, (C. C. A.) 260 Fed. 1. In that

case the Commission had described the person enrolled as the child of Jennie McGilbra, whereas, the mother of such person was in fact Lizzie McGilbra. It was held that this error in the matter of parentage was immaterial and that the person enrolled by the Commission was the same person whose name appeared on the 1895 Roll as Lettie McGilbra. The court in that opinion, says:

“Having concluded that the name Lettie McGilbra as it appeared upon the original 1895 Tribal Roll represented not Nellie Porter, nor Nellie Deer, nor Nellie McGilbra, but Lettie McGilbra, an entirely different person, the appearance of that name on the 1895 Tribal Roll under the circumstances of this case must be treated in contemplation of law as the application of Lettie McGilbra for enrollment by the Dawes Commission. They entertained that application when they transferred the name to the census card. They then, pursuant to such application, proceeded to investigate her right to enrollment. However misleading or however far from the truth may have been the information secured in the course of such investigation, still the person whose right to enrollment was being investigated was the individual represented by the name on the Tribal Roll. She was the applicant. This applicant was Lettie McGilbra. The Commission acted favorably on said application and enrolled the applicant. It follows that this name on the approved Roll represents not Nellie Porter, nor Nellie Deer, but Lettie McGilbra, deceased, daughter of Lizzie McGilbra. Involved in this enrollment is the conclusive finding by the Dawes Commission that Lettie

McGilbra was a duly and legally enrolled member of the Creek Tribe in 1895, and who was living April 1, 1899."

Thus, it is decided that the name of Lettie McGilbra on the 1895 Tribal Roll treated in contemplation of law as the application of Lettie McGilbra for enrollment by the Dawes Commission is the fact that conferred jurisdiction on the Commission to enroll that person. That when the Dawes Commission transferred the name to the census card they entertained that application. That the appearance of that name on the 1895 Tribal Roll and the transfer thereof to the census card were conclusive of the fact that the person whose name appeared on the 1895 Roll was the identical person enrolled. They obtained jurisdiction of the person for whom application had been made and enrolled that identical person.

The Commissioner on February the 23rd, 1906, rendered his "decision" in the matter of the application for the enrollment of Cheparney Larney. The finding of the Commissioner, material to this case, is as follows:

"It appears from the records of this office that on April the 24th, 1905, testimony was offered in the matter of the application of the enrollment of certain New Borns as citizens of the Creek Nation, which embraced a child of Jacob Larney (or Green) and Bettie Larney (or Green), which is herein considered as an original application for the enrollment of said person as a citizen by blood of the Creek Nation."

The testimony of April the 24th, 1905, considered as an original application by the Commissioner is as follows:

"Jacob Larney (or Green), Arbeka Tulledega Town, Bettie Larney (or Green), Hillabee Town have a child. Postoffice, Hanna, Indian Territory." (I., p. 22.)

When Alex Posey, who was then engaged in the field for the Dawes Commission securing evidence about Creek citizens and New Borns gave the testimony as hereinbefore set out and when said testimony was considered by the Commissioner as the original application for the enrollment of a certain New Born Creek Indian child called by the Commission itself, Cheparney Larney, the said person whose right to enrollment was being investigated was the individual whose name appeared in the original application for enrollment made by Alex Posey. The application was made for a child whose father was Jacob Larney (or Green), Arbeka Tulledega Town, and whose mother was Bettie Larney (or Green), Hillabee Town. The evidence shows that the father of appellee was Jacob Larney enrolled as Jacob Tiger on the Creek Tribal Rolls, opposite Roll No. 7968, and that his mother Pettie Larney, called by Alex Posey in the application for enrollment Bettie Larney, was enrolled as Lucy Green, opposite Roll No. 8361, and the enrollments of Jacob Tiger and Lucy Green, were approved by the Secretary of the Interior prior to the date of the

approval of the Act of March the 3rd, 1905. It is shown by Exhibit No. 15, that Jacob Tiger was a member of Tulledega Town and by plaintiff's Exhibit No. 14, that Lucy Green was a member of Hillabee Town, and plaintiff's Exhibit No. 13, shows that Big Jack was a member of Hillabee Canadian Town, and that Bettie his wife was a member of Hillabee Canadian Town.

The principle announced in the case of *Porter v. U. S.*, (C. C. A.) 260 Fed. 1, is identical with the principle involved here. When an application for enrollment of a certain child was made and the Commission entertained that application and thereon rendered its judgment enrolling the person for whom application had been made, that judgment became final and conclusive as to the identity of the person enrolled. When Alex Posey acting for the Dawes Commission went into the field to look up Indian children entitled to enrollment under the Act of March 3, 1905, and found a particular child entitled to enrollment and made application for the enrollment of said child he became the agent of the said child for that purpose. And the application for the enrollment of said child filed by Alex Posey became, in law, the application of said child just as much so as if the child itself had made the application. The Circuit Court of Appeals, in affirming the *Porter* case, quotes with approval from Judge CAMPBELL's opinion:

“I cannot accept this contention as sound—the appearance of that name on the 1895 Tribal Roll under the circumstances of this case must be treated in contemplation of law as the application of Lettie McGilbra for enrollment by the Dawes Commission. They entertained that application when they transferred the name to the census card. They then, pursuant to such application, proceeded to investigate her right to enrollment. However misleading or however far from the truth may have been the information secured in the course of such investigation, still the person whose right to enrollment was being investigated, was the individual represented by the name on the Tribal Roll. * * * The Commission acted favorably on said application and enrolled the applicant.”

We believe that the doctrine of the *Porter* case settles the issue of this suit.

That in regard to the identity of the person enrolled there is neither doubt nor ambiguity, but that it is perfectly clear and conclusive that the child for whom application was made is the identical child enrolled.

But the trial court held that there was an ambiguity in the record concerning the parentage of the child enrolled and decided in favor of appellee. The parol evidence introduced upon this question undoubtedly supports the finding of the court. In regard to the children of Big Jack or Jackey Thlocco and Bettie Jack or Thlocco the evidence shows that they had three sons: Tecumseh, Okchumpulla and a

younger boy. Witnesses for both parties testified at the trial that these Indians had three sons.

Big Jack, testified: "When Alex Posey was in that country trying to find New Born Creeks I had three boys." (Tr., p. 19.)

J. H. Hill, testified: "I only knew two of his boys: Tecumseh and Okchumpulla. I did not know the other boy, but heard that there was a boy by the name of Okseetka." (Tr., p. 13.)

Joseph Pigeon, testified: "I know Tecumseh, he is Big Jack's son. Big Jack had another boy besides Okchumpulla and Tecumseh, whose name was Okseetka." (Tr., p. 14.)

Thomas Red, witness for appellant testified: "I am well acquainted with Big Jack and his wife, Bettie. I got acquainted with them a little before the Civil War. I now live about two miles from them and lived at the same place at time of enrollment. Big Jack lived at the same place. I know their children. They had three boys." (Tr., p. 16.)

George Simmons, witness for appellant, testified: "I know the defendants Big Jack and Bettie. Have known them for twenty-six years. I live six miles from them. I know their children. They had three boys." (Tr., p. 17.)

Cutsee Harjo, witness for appellant, testified: "I know the defendants Big Jack and Bettie. Have known them since the close of the Civil War. I live

near them. I know their children. They had three boys." (Tr., pp. 17-18.)

It is shown by the record evidence of the Dawes Commission that two of the boys of Big Jack and Bettie were enrolled by the Commissioner and that the application for the enrollment of a third boy was dismissed. The enrollment of Tecumseh, one of the sons of Big Jack and Bettie is shown by appellee's Exhibit 13 found opposite page 38, of the transcript. The enrollment of Okchumpulla is shown by plaintiff's Exhibit 6, opposite page 34, of the transcript. The application for enrollment of Okseetka the youngest son of Big Jack and Bettie is shown to have been dismissed by the Commission by Exhibit 5, page 33 of the transcript.

Thus, it is conclusively shown by the evidence, both record and parol, that Big Jack and Bettie had three sons. It is shown by the record evidence that three boys of Big Jack and Bettie are accounted for in the matter of enrollment. Two were enrolled and the application for enrollment of the third boy was dismissed. No other application for enrollment of a boy of Big Jack and Bettie was made.

In this connection, we call the court's attention to the evidence of Alex Posey, the person who filed the application for the enrollment of the child of Jacob Larney and Bettie Larney, given February the 16th, 1907, which is a part of the enrollment record in this case and appears at page 24 of the transcript, the material part of which is as follows:

- Q. "What is your name, age and postoffice address?
- A. Alex Posey, age 33, Muskogee.
- Q. Did you on July 19, 1905, go to the home of Jacob and Bettie Larney, for the purpose of obtaining information with reference to a child of theirs.
- A. Yes, sir.
- Q. Was that child a boy or girl?
- A. I am under the impression he was a boy.
- Q. What is your best opinion with reference to the age of that child?
- A. The child appeared at that time to be about a year old.
- Q. The parents of that child refused to give any information concerning that child?
- A. They wouldn't give any information whatever.
- Q. Do you know whether they are members of the Snake or disaffected faction of Creeks?
- A. The father of the child's mother very much opposed the work of this Commission.
- Q. Do you know if the child is now living?
- A. I made inquiries about this child a short time ago and I am informed that the child is still living."

For the purpose of determining what woman was referred to by Alex Posey in his testimony, which was taken as the application for the enrollment of a young child, we call attention to the fact that he stated that the father of the child's mother very much opposed the work of this Commission. Now, in connection with that statement made by

Alex Posey, we call attention to the evidence given at the trial in the United States District Court by Bennie or Ben Green, as shown on page 10 of the transcript, and is as follows:

"I knew a man in that neighborhood by the name of Jacob Larney or Jacob Tiger. I knew a woman by the name of Petey, or Petey Larney, she was my daughter. Jacob Larney was her husband. They had three children born to them. Their names was Chebon Larney, Joe Larney and one died an infant without name, Joe Larney and Cheparney Larney are now living. I am guardian for both of them."

And later in his evidence he says:

"I knew an Indian named Alex Posey. I saw him in my neighborhood about the time Cheparney Larney was about a year old. At that time I was a member of a group of Indians opposed to the work of the Dawes Commission who were trying to allot the land."

In this connection we call attention to the evidence given at the trial by Bettie, the wife of Big Jack, as shown on page 19, of the transcript:

"My name is Bettie. I am the wife of Big Jack, when I was a girl I was called Bettie Larney. My father and my mother died before I knew them."

Thus, it is conclusively shown by the evidence that the mother of the child Cheparney Larney had a living father who was opposed to the work of the Dawes Commission. Bettie the wife of Big Jack had

never known her father. Bennie Green the father of the mother of appellee was opposed to the work of the Dawes Commission. The mother of the child for whom Alex Posey made application could not have been Bettie, the wife of Big Jack, but the daughter of Bennie Green was the mother of that child and the wife of Jacob Larney the father of said child.

We think it is conclusively shown that appellee was the identical child enrolled and if it may be said that an ambiguity exists in the record it is in the matter of parentage alone.

After hearing the evidence the trial court concluded, as follows:

“The Court: The question of the validity of the judgment of the Dawes Commission is not involved. The question before this court is whether the plaintiff who sues through his guardian in this case and who has been known by the name of Cheparney Larney is the identical person who was enrolled by the Commission to the Five Civilized Tribes as the son of Jacob Larney, Roll number ... and of Peetie Larney, Roll number ... as contended on the part of plaintiff.

“The record shows that Big Jack is enrolled under the Creek Dawes Roll number 8291 and Bettie, wife of Big Jack, appears opposite the Dawes Roll number 8292. The question here presented is as to an ambiguity in the record. The entire record of the enrollment comes up for the consideration of the court, not only the certificate of the enrollment by the record includ-

ing the application and the evidence. That is the way I understand the law. Now application is made on April 24th, 1905, by Alex Posey who presented to the Commission a list of children for whom application could not be made theretofore and he made the application as follows: 'the child of Jacob Larney (or Green), Arbeka Tulledega Town, Bettie Larney (or Green), Hillabee Town.' Now Jacob Larney who is enrolled as Jacob Tiger was from Arbeka Tulledega Town and Lucy Green, I believe that is her name, being the name by which she is enrolled being also known as Bettie Green and as Peetie Larney appears to be the mother of the plaintiff, Cheparney Larney. Now Big Jack was not from Arbeka Tulledega Town. I believe from this evidence that this child, Okseetka, is the child that the defendants' witnesses referred to. I can't believe the defendants' witnesses who testified that Big Jack had a child a year or two or three years old and that prior to enrollment, prior to the time Alex Posey went down in that community he was called Cheparney Larney. This record undisputably shows that the Commission to the Five Civilized Tribes gave him that name and it is unreasonable evidence when it shows that prior to that time he was called in that community by the name that the Dawes Commission afterwards arbitrarily gave him. Now these old Indians, I don't find they committed perjury. This has been a long time and my experience as a lawyer tells me about matters remote that the recollection of witnesses is easily and erroneously refreshed sometimes as to remote matters. So I find generally in favor of plaintiff and a decree will be entered by this court removing the cloud from the title." (Tr., pp. 20-21.)

We think that there can be no serious controversy as to the identity of the child enrolled; that in that respect the judgment of the Dawes Commission is clear, unambiguous and conclusive. That the opportunity of controversy is found in that portion of the "decision" of the Dawes Commission when it mentions the parents of the child for whom application had been made, as follows, to-wit:

"The evidence and the records of this office show that said Cheparney Larney is the child of Jacob Larney and Bettie Larney, whose names appear as 'Big Jack' and 'Bettie' on a schedule of citizens by blood of the Creek Nation, approved by the Secretary of the Interior March the 28th, 1902, opposite Nos. 8291 and 8292, respectively."

We think that the fact that in said record Jacob Larney was confused with Big Jack and Bettie Larney was confused with Bettie does not affect the conclusive finding that a child of Jacob Larney and Bettie Larney for whom application had been made was in fact enrolled. In discussing this question and the authorities cited the Circuit Court of Appeals (289 Fed. p. 395) says:

"It is apparent from the wording of the statute that the applicant to be entitled to enrollment, must have been (1) born subsequent to May 25, 1901; (2) born prior to March 4, 1905; (3) living on March 4, 1905; (4) born to citizens of the Creek Tribe whose enrollment had been approved by the Secretary of the In-

terior prior to March 3, 1905. The enrollment of the applicant, and especially, when followed, as in the case at bar, by a certificate as to allotment and by allotment deeds or patents, would be conclusive that these four matters had been decided favorably to the applicant. Cases, *supra*.

"But any findings or recitals on matters other than these, for example, the exact age of the applicant, as in *Malone v. Alderdice*; or the exact names of the parents, as in *Porter v. U. S.*; or the marital relationship of the applicant, as in *U. S. v. Lena*—would not be of binding or conclusive effect, because they were not required to be found, either by the statute or as the necessary basis for the decision; and for like reason a finding as to the sex of the applicant, or as to the enrollment numbers of the parents of the applicant, or their aliases, would not be conclusive. Such matters might be stated as aids to identify the applicant, but mistakes in such statements would not affect the validity of the patent, nor prevent the applicant from proving his identity. The two classes of findings must not be confused.

"In the decision of the Commissioner there is a recital that the applicant was a child of Jacob Larney (or Green) and Bettie Larney (or Green). There is also a finding that, about July 19, 1905, the applicant appeared to be about one year old. This was equivalent to findings that the applicant was born subsequent to May 25, 1901, but prior to March 4, 1905, and was living on the latter date. The finding upon which appellants rely is this:

'The evidence and the records of this office show that said Cheparney Larney is

the child of Jacob Larney and Bettie Larney, whose names appear as "Big Jack" and "Bettie" on a schedule of citizens by blood of the Creek Nation, approved by the Secretary of the Interior March 28, 1902, opposite Nos. 8291 and 8292, respectively.'

"The only material fact here found was that the enrollment of the child's parents, already recited as Jacob Larney and Bettie Larney, as citizens of the Creek Tribe, had been approved by the Secretary of the Interior prior to March 3, 1905. This fact was a matter of record with the Commissioner, and this record evidence introduced at the present trial showed that their enrollment was approved by the Secretary of the Interior on March 28, 1902, as the finding alleges. The recital to the effect that Jacob Larney and wife were identical with 'Big Jack' and wife, and the recital of the roll numbers, were unnecessary and of no binding effect. Suppose that there had been an actual pending controversy whether the child whose application was being considered was the child of Jacob Larney and wife, or of 'Big Jack' and wife. It is clear, since the enrollment of all of these four people had been approved by the Secretary of the Interior prior to March 3, 1905, as shown by the records in evidence, that the Commission would not have been called upon to decide the dispute as to parentage, and, if it had decided it, the decision would not be binding. The only finding that was material for the Commission to make was that the enrollment of the parents, whoever they were, being citizens of the Creek Tribe, had been approved by the Secretary of the Interior prior to March 3, 1905.

"Omitting from this finding the surplusage as to the aliases of Jacob Larney and wife and the numbers of the enrollment, the essential part remains that they were citizens of the Creek Tribe, and that their enrollment had been approved by the Secretary of the Interior, on March 28, 1902. The cases relied upon by appellants and cited above as to the conclusive effect of findings by the Commissioner, are in harmony with these views. They all hold that findings which are necessary to the adjudication are conclusive. But they also clearly hold that findings which are not necessary to the adjudication are not conclusive.

"Appellants themselves abandon the theory that this finding upon which they rely, is conclusive in its entirety. Their whole case depends upon a rejection of that part of the finding relating to the identity of Jacob Larney and wife with 'Big Jack' and wife. The decision of the Commissioner in our opinion was ambiguous as to the identity of the applicant, and extrinsic evidence was admissible to prove it.

"2. The evidence, extrinsic of the decision of the Commissioner, as to the identity of the plaintiff with the applicant who was actually enrolled, is to our minds clear and convincing. The testimony of Posey that the child whom he reported for enrollment was the child of Jacob Larney and wife, found by him at their house; the evidence that this report and Posey's testimony were the basis of the application for the enrollment actually made; that the parents of the child whom Posey reported were unwilling to give the child's name, owing to the antagonistic attitude of the maternal grandfather, and that the Commissioner, being unable to find out

the real name of the child, named 'Cheparney Larney'; that the three sons of 'Big Jack' were all accounted for on the records of the Commission, two of them having been enrolled and one rejected; that Posey did not visit the house of 'Big Jack' and report his children, but such report was made by a different agent; that Jacob Larney, whose boy Posey reported was of Arkeka Tulledega Town, and his wife of Hillabee Town, and that the record evidence shows such to be the facts as to plaintiff's father and mother, but not to be the facts as to 'Big Jack' and his wife; that the government officials in July, 1907, notified Jacob Larney of the enrollment of his son, and requested him to make a selection of lands; that the government officials again, in May, 1908, notified Jacob Larney of an arbitrary allotment of lands to his son, which is the allotment here in controversy; that the deeds to the allotment were delivered to Jacob Larney for his son, the present plaintiff, and that possession of the lands was taken on behalf of the plaintiff, and that no claim to the land was made by 'Big Jack' for years—all establishes clearly that the applicant before the Commissioner was the present plaintiff, the child of Jacob Larney and wife, that he was the person enrolled, and that this was so understood by the Commission."

II.

Did the Trial Court Have Jurisdiction of This Cause?

The bill of complaint in this case might have stated the federal question more elaborately—it could have plead that a construction of the Act of

March 3, 1905, was involved for determination of this case. But it was clear to a person familiar with Indian land law that said act was involved from the allegations in the bill of complaint. The defendant below joined issue upon the federal question involved, without suggesting that the complaint did not raise a federal question, and his brief filed in this court argues nothing else than a federal question, except the question of jurisdiction. From the pleadings and the proofs contained in the record of this case, it clearly appears that the plaintiff's claim is based upon one construction of the Act of March 3, 1905 (33 Stat. 1048), while the defendants' claim is based upon a different construction of the same act. This makes a federal question.

Where the jurisdiction is not challenged by a pleading, but the question is raised for the first time in the appellate court, jurisdiction sufficiently appears if it is shown in any part of the record including the proofs.

—*Robertson v. Cease*, 97 U. S. 646, 648, 24 L. ed. 1057;

Sun Printing Ass'n v. Edwards, 194 U. S. 377, 382, 24 Sup. Ct. 696, 48 L. ed. 1027;

Horne v. Hammond Co., 155 U. S. 393, 15 Sup. Ct. 167, 39 L. ed. 197;

Doolan v. Carr, 125 U. S. 618, 8 Sup. Ct. 1228, 31 L. ed. 844;

Mahoning Valley Railway Co. v. O'Hara, 196 Fed. 945, 116 C. C. A. 495.

For the reasons herein stated we think that the judgment rendered in this case should be affirmed.

Respectfully submitted,

ELIAS J. VANCOURT,

CLARK NICHOLS,

HORACE D. REUBELT,

Counsel for Appellees.